

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 DC COMICS, ) CV 11-3934 RSWL (OPx)  
12 )  
13 Plaintiff, )  
14 v. ) **STATEMENT OF**  
15 MARK TOWLE, an individual ) **UNCONTROVERTED**  
16 and d/b/a Gotham Garage, ) **FACTS AND CONCLUSIONS**  
17 and DOES 1-10, inclusive, ) **OF LAW re: Plaintiff DC**  
18 ) **Comics' Motion for**  
19 ) **Partial Summary Judgment**  
20 ) **[42]**  
21 )  
22 Defendants. )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

20 After consideration of Plaintiff DC Comics' Motion  
21 for Partial Summary Judgment [42], this Court makes the  
22 following findings of fact and conclusions of law:

23 **UNCONTROVERTED FACTS**

24 1. Plaintiff DC Comics ("Plaintiff") is a New York  
25 General Partnership consisting of E.C. Publications,  
26 Inc. and Warner Communications Inc. Pl.'s Statement of  
27 Uncontroverted Facts and Conclusions of Law ("SUF") ¶ 1  
28 [43]. Plaintiff is the successor-in-interest to

1 Detective Comics, Inc., National Comics Publications,  
2 Inc., National Periodical Publications, Inc., and DC  
3 Comics Inc. Id. ¶ 2.

4 2. Plaintiff is the publisher of comic books  
5 featuring the world-famous Batman and his Batmobile.  
6 Id. ¶¶ 3-4. Originally introduced in 1941, the  
7 Batmobile is a fictional high-tech automobile that  
8 Batman employs as his primary mode of transportation.  
9 Id. ¶¶ 9-10. Batman and his Batmobile vehicle have  
10 appeared in comic books, television shows, and  
11 blockbuster movies, including the television series,  
12 *Batman*, that first appeared in 1966 and the 1989 film,  
13 *Batman*. Id. ¶¶ 7, 13, 27.

14 3. Plaintiff owns the copyright registrations to  
15 the Batman comic books. Id. ¶ 12.

16 4. In 1965, Plaintiff's predecessor, National  
17 Periodical, licensed its Batman literary property to  
18 American Broadcasting Company ("ABC") for use in the  
19 1966 *Batman* television series, which starred Adam West  
20 as Batman. Id. ¶ 13. ABC contracted with Greenway  
21 Productions, Inc. ("Greenway") and Twentieth Century-  
22 Fox Television, Inc. ("Fox") to produce the television  
23 series. Id. ¶ 15. Fox and Greenway own the copyright  
24 registrations for all of the episodes of the 1960s  
25 *Batman* television series. Id. ¶ 16. The Batmobile  
26 that appeared in the television series (hereinafter,  
27 "the 1966 Batmobile") was manufactured by Barris Kustom  
28 City and designed by George Barris. Id. ¶ 19. Barris

1 Kustom City retained title to the original Batmobile  
2 vehicle that was used in the filming of the television  
3 show. Id.

4 5. In 1979, Plaintiff entered into an agreement  
5 with Batman Productions, Inc., granting the use of its  
6 Batman literary property in feature-length motion  
7 pictures. Id. ¶ 25. These rights were assigned to  
8 Warner Bros. Inc. ("Warner Bros.") and resulted in a  
9 series of Batman films, including the 1989 *Batman* film  
10 to which Warner Bros. owns the copyright registration.  
11 Id. ¶¶ 27-28. Anton Furst was hired to construct the  
12 Batmobile that appeared in the 1989 film (hereinafter,  
13 "the 1989 Batmobile"). Id. ¶ 31.

14 6. Plaintiff also owns a number of Batman-related  
15 trademarks, including, the BATMOBILE wordmark, the BAT  
16 emblem design mark, the BAT REP II design mark, the  
17 BATMAN wordmark, and other variations of the Batman  
18 symbol. Id. ¶ 35. The trademarks are registered in  
19 various classes, and appear on merchandise such as toy  
20 figurines and automobiles, apparel, and household  
21 goods. Id. ¶¶ 37, 40.

22 7. Plaintiff also licenses to Fiberglass Freaks  
23 the manufacture and customization of full-size  
24 automobiles into the Batmobile vehicles featuring  
25 Plaintiff's trademarks. Id. ¶ 39. Plaintiff has also  
26 contracted with George Barris, the designer of the  
27 original 1966 Batmobile, to produce replicas of the  
28 1966 Batmobile, featuring Plaintiff's trademarks, and

1 to exhibit them around the world. Id. ¶ 38.

2 8. Defendant Mark Towle ("Defendant") is the  
3 owner, operator, and manager of a business producing  
4 custom cars modeled after vehicles found in various  
5 television shows and movies. Id. ¶ 44. Defendant has  
6 been producing and selling replica vehicles based on  
7 the 1966 and 1989 Batmobile vehicles and car kits that  
8 allow others to customize their vehicles into the  
9 Batmobile. Id. ¶¶ 45-48, 50. Defendant has also  
10 manufactured and distributed various automobile parts  
11 and accessories featuring the Batman trademarks. Id. ¶  
12 51. Defendant does business through the websites  
13 www.gothamgarage.net, www.gothamgarage.com,  
14 www.marktowle.com,, and www.batmobilereplicas.com,  
15 which use Plaintiff's trademarks to promote Defendant's  
16 business. Id. ¶¶ 52-53.

17 9. Defendant has admitted his knowledge of the  
18 Batman property, including the 1966 television series  
19 Batman, the 1989 film, *Batman*, the 1966 Batmobile, the  
20 1989 Batmobile, and in the various Bat emblems and  
21 symbols used. Id. ¶ 54.

22 10. Plaintiff did not authorize Defendant's  
23 products. Id. ¶ 56.

#### 24 CONCLUSIONS OF LAW

25 1. To sustain a claim for trademark infringement,  
26 Plaintiff must show (1) that it has valid trademark  
27 rights; and (2) that Defendant's use of similar marks  
28 is likely to cause confusion. Applied Info. Sciences

1 Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007).

2       2. The core element of trademark infringement is  
3 the likelihood of confusion, i.e., whether the  
4 similarity of the marks is likely to confuse customers  
5 about the source of the products. E. & J. Gallo Winery  
6 v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir.  
7 1992). Courts look to the following factors, known as  
8 the Sleekcraft test, for guidance in determining the  
9 likelihood of confusion: (1) strength of Plaintiff's  
10 mark; (2) proximity of the goods; (3) similarity of the  
11 marks; (4) evidence of actual confusion; (5) marketing  
12 channels used; (6) type of goods and the degree of care  
13 likely to be exercised by the purchaser; (7)  
14 Defendant's intent in selecting the mark; and the (8)  
15 likelihood of expansion of the product lines. Dr.  
16 Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d  
17 1394, 1404 (9th Cir. 1997) (citing AMF Inc. v.  
18 Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir.  
19 1979)).

20       3. Plaintiff's trademarks are valid.

21       4. Defendant's use of Plaintiff's marks is likely  
22 to confuse consumers.

23       5. Courts have uniformly held that common law and  
24 statutory trademark infringement are merely specific  
25 aspects of unfair competition. New West Corp. v. NYM  
26 Co. of California, Inc., 595 F.2d 1194, 1201 (9th Cir.  
27 1979). The decisive test of common law unfair  
28 competition is whether the public is likely to be

1 deceived about the source of goods or services by the  
2 defendant's conduct. Academy of Motion Picture Arts  
3 and Scis. v. Benson, 15 Cal. 2d 685, 690 (1940); South  
4 Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal.  
5 App. 4th 861, 865 (1999).

6 6. Defendant's use of the bat symbols and  
7 Plaintiff's trademarks marks is likely to confuse  
8 customers. Thus, Defendant is liable on Plaintiff's  
9 unfair competition claim.

10 7. To establish copyright infringement, two  
11 elements must be proven: 1) ownership of a valid  
12 copyright; and 2) copying of protected elements of the  
13 plaintiff's work. See Feist Publ'ns, Inc. v. Rural  
14 Tel. Serv. Co., 499 U.S. 340, 361 (1991).

15 8. Copying may be established by showing that the  
16 works in question are "substantially similar in their  
17 protected elements" and that the infringing party had  
18 access to the copyrighted work. Metcalf v. Bochco, 294  
19 F.3d 1069, 1072 (9th Cir. 2002).

20 9. Plaintiff owns exclusive merchandising rights  
21 to the 1989 and 1966 Batmobile vehicles based on  
22 various agreements with ABC, Warner Bros., Fox, and  
23 Greenway.

24 10. The Ninth Circuit has explained that "copyright  
25 protection may be afforded to characters visually  
26 depicted in a television series or in a movie." Olson  
27 v. Nat'l Broad. Co., 855 F.2d 1446, 1452 (9th Cir.  
28 1988) (internal citations omitted). Under the

1 "character delineation" test, the Ninth Circuit has  
2 recognized that copyright protection may be afforded to  
3 characters who are "especially distinctive." Halicki  
4 Films, LLC v. Sanderson Sales and Mktg., 547 F.3d 1213,  
5 1223 (9th Cir. 2008). The court has noted that  
6 "[c]haracters that have received copyright protection  
7 have displayed consistent, widely identifiable traits."  
8 Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir.  
9 2003).

10 11. The Batmobile is entitled to copyright  
11 protection because it is a delineated character.

12 12. Copyright protection extends to "pictorial,  
13 graphic, and sculptural works". 17 U.S.C. § 102.

14 13. Only works that "can be identified separately  
15 from, and are capable of existing independently of, the  
16 utilitarian aspects of [a useful] article" qualify for  
17 copyright protection. Leicester v. Warner Bros., 232  
18 F.3d 1212, 1219 (9th Cir. 2000) (citing William F.  
19 Patry, 1 Copyright Law and Practice 274-76 (1994)).

20 14. Courts have recognized two types of  
21 separability: physical separability, and conceptual  
22 separability. Id. "Physical separability means that a  
23 'pictorial, graphic or sculptural feature incorporated  
24 into the design of a useful article . . . can be  
25 physically separated from the article without impairing  
26 the article's utility and if, once separated, it can  
27 stand alone as a work of art traditionally conceived.'" Id.  
28 Id. On the other hand, conceptual separability means

1 that a pictorial, graphic or sculptural feature "can  
2 stand on its own as a work of art traditionally  
3 conceived, and . . . the useful article in which it is  
4 embodied would be equally useful without it." Id.

5 15. The artistic features of the 1989 and 1966  
6 Batmobile vehicles can be conceptually separated from  
7 their utilitarian features. Those features are  
8 entitled to copyright protection.

9 16. Defendant's replicas are substantially similar  
10 to the 1989 and 1966 Batmobile vehicles in their  
11 protected elements.

12 17. Defendant had access to the 1989 and 1966  
13 Batmobile vehicles.

14 18. Defendant is liable for copyright  
15 infringement.

16  
17 **IT IS SO ORDERED.**

18 DATED: February 7, 2013.

19  
20 RONALD S.W. LEW

21 **HONORABLE RONALD S.W. LEW**  
22 Senior, U.S. District Court Judge  
23  
24  
25  
26  
27  
28